519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); *citing*, *Illinois v. Gates*, 462 U.S. 213, 218-220, 103 S.Ct. 2317, 2321-2323, 76 L.Ed.2d 5327 (1983). In determining whether the state court has had or was afforded a fair opportunity to address a federal question that is sought to be presented to the Supreme Court, at a minimum, there should be no doubt from the record that a claim under a federal statute or under the Constitution was presented and that the state court was timely appraised of the nature or substance of the federal claim. *See*, *Webb*, *supra*.

A. NO STATE APPELLATE COURT HAS HAD AN OPPORTUNITY TO REVIEW AND/OR RULE UPON ROUSH'S CLAIM THAT HIS DUE PROCESS AND/OR CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TRIAL JUDGE'S FAILURE TO TIMELY RECUSE HIMSELF.

At no time during the years that this matter moved through the state court appellate process did Roush raise a due process and/or constitutional challenge to the Trial Judge's failure to timely recuse himself or from the alleged concealment of a business relationship with Chalkey's counsel.

It should be noted that the business relationship now at issue between Chalkey's counsel and the Trial Judge arose from Chalkey's counsel representing the estate of the Trial Judge's deceased father. A Complaint was filed on behalf of the estate, with the Trial Judge, the Executor of the estate acting as the moving party. The Estate's Complaint was filed in November of 2002. The preliminary injunction hearing and hearing on the merits of the Chalkey Complaint occurred on July 13, 1998, more than three years prior to the estate work.

The alleged conflict apparently took place when the Trial Judge heard arguments on Roush's Exceptions and Motions for Post-Trial Relief after the matter was remanded to the trial court for the issuance of a *Decree Nisi* by the Pennsylvania Superior Court. The Opinion and *Decree Nisi* were filed of record on December 7, 2002. Roush filed his Exceptions and Motion for Post-Trial Relief on December 24, 2002. At the request of counsel, on February 14, 2003, the Trial Judge did recuse himself. The matter was then transferred to another judge who reviewed the arguments, Exceptions and Motion's for Post-Trial Relief and issued a final Order on May 22, 2003.

Roush was obviously aware of any alleged due process and/or constitutional claims at the time he requested the recusal in February, 2003. At no time prior to this Petition for Writ of Certiorari did Roush raise these alleged federal claims relating to the Trial Judge's failure to timely recuse himself. Therefore, no Pennsylvania state appellate court was provided with an opportunity to review or address these claims, and this Court should decline to hear them now.

B. NO STATE APPELLATE COURT HAS HAD AN OPPORTUNITY TO REVIEW AND/OR RULE UPON THE CLAIMS THAT ROUSH'S DUE PROCESS AND/OR CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE INCORPORATION OF PRIOR TESTIMONY INTO THE HEARING ON THE MERITS OF THE COMPLAINT OR BY THE DENIAL OF HIS MOTION TO DISMISS.

Roush attempts to circumvent this Court's rules governing the exercise of appellate jurisdiction by reclassifying, as due process and/or constitutional violations,

issues concerning procedural and evidentiary matters addressed by both the Trial and Pennsylvania appellate courts. What Roush hopes for by framing these issues in such a manner is a second, third and, in some ways, a fourth bite at the apple with respect to his appeal from the equity trial.

Roush alleged, before the Pennsylvania Superior Court, that the Trial Court erred in incorporating the testimony from a prior preliminary injunction hearing into a hearing on the merits of Chalkey's Complaint. After addressing the appropriateness of the evidentiary admission, the Superior Court determined that Roush waived any claim based on this issue for his failure to make a timely objection during the hearing. In his Petition for Allowance of Appeal to the Pennsylvania Supreme Court, Roush alleged that the Pennsylvania Superior Court erred in holding that he had waived any objection to the Trial Court's introduction of the preliminary injunction testimony. At no time before any Pennsylvania appellate court did Roush allege or infer that his due process and/or constitutional rights were somehow violated during the equity trial where he represented himself.

Similarly, Roush now alleges that his due process and/or constitutional rights were violated when the Superior Court of Pennsylvania upheld the Trial Court's denial of his Motion to Dismiss.

Before the Pennsylvania Superior Court, Roush alleged that the denial of the Motion to Dismiss was improper. Likewise, before the Pennsylvania Supreme Court, Roush alleged that, based on the evidentiary record, the Pennsylvania Superior Court's decision upholding the denial was in error. At no time before any Pennsylvania appellate

court did Roush allege that the denial of the Motion to Dismiss violated his due process and/or constitutional rights.

In determining whether to exercise jurisdiction over questions not properly raised below, this Court focuses on the policies that animate the "not pressed or passed upon below" rule. *See, Banker's Life v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988). These policies are first, comity to the states, and second, a constellation of practical considerations, chief among which is the need for a properly developed record on appeal. *Id*; *citing*, *Webb*, *supra*, 451 U.S. at 500-501, 101 S.Ct. at 1893-1894.

Prior to his Petition for Writ of Certiorari to this Court, Roush never raised a due process and/or constitutional challenge, or any challenge for that matter, to the Trial Judge's failure to timely recuse himself. In addition, while the appropriateness of the incorporation of testimony and denial of the Motion to Dismiss were addressed by the state appellate courts on evidentiary and procedural grounds, Roush's alleged due process and/or constitutional claims surrounding these appellate issues were never raised in any state appellate court. The state appellate courts have therefore not had an opportunity to review and address any of Roush's alleged due process and/or constitutional claims. Further, because the issues were never raised, no properly developed record exists for this Court to review.

Accordingly, this Court should decline to review Roush's claims under its certiorari jurisdiction.

CONCLUSION

For the reasons set forth above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(2)

Supreme Court, U.S.
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No. 05-132

IN THE

SUPREME COURT of the UNITED STATES

FRANKLIN D. ROUSH, JR.,

Petitioner,

v.

MARY CHALKEY, a/k/a MARY MATULA,

Respondent.

On Petition For Writ of Certiorari To The Superior Court of Pennsylvania, Pittsburgh Office

REPLY TO BRIEF IN OPPOSITION

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REPLY TO COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether The United States Supreme Court should exercise its certiorari jurisdiction when a trial judge conceals his conflict of interest with Respondent's counsel until after conclusion of the hearing process, determining facts and conclusions of law by issuing a Decree Nisi and the procedural time for preserving issues for appeal has elapsed?

    A. Does the trial judge so infused the trial with unfairness as to deny due process by unequivocally concealing his conflict of interest of quid pro quo while issuing a Decree Nisi against Petitioner despite two Motions to Dismiss when Respondent presented absolutely no evidence at trial?

    B. Should The United States Supreme Court exercise its certiorari jurisdiction when an appeals court raises and decides a new issue on appeal by characterizing without *notice*, Petitioner's first Motion to Dismiss made at the beginning of the trial as limited to Respondent's failure to provide a list of witnesses, despite Petitioner arguing that he received no "list of witnesses, what they were going to testify to, about and any type of reports he has," Respondent announced that he had no witnesses and the trial judge denied the Motion to Dismiss on the basis that there were no witnesses expected to be called?

LIST OF PARTIES

Petitioner, Franklin D. Roush, Jr., Esquire

Respondent, Mary Chalkey, a/k/a Mary Matula

TABLE OF CONTENTS

	Page
REPLY TO COUNTER-STATEMENT OF THE QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
REPLY TO COUNTER-STATEMENT OF THE CASE.....	1
REPLY TO SUMMARY OF THE ARGUMENT.....	2
REPLY TO ARGUMENT	3
CONCLUSION.....	10
APPENDIX.....	A1

TABLE OF AUTHORITIES

Page

CASES

Lisenba v. California,
314 U.S. 219 at 236 (1941)..... 4

Schslinger v. Councilman,
420 U.S 738 at 733, 95 S. Ct. 1399,
43 L. Ed. 2d 591 (1975)..... 3

United States v. Cronic,
466 U. S. 648, 659, N. 26, 104
S. Ct. 2039, 60 L. Ed. 2d 657 (1984)..... 9

Ward v. Maryland,
79 U.S. 419, 430 (1870)..... 5

Wood v. Georgia,
450 U.S. 261, 271, 570, 101 S. Ct.
1097, 67 L. Ed. 2d 220 (1980)..... 3, 7

REPLY TO COUNTER-STATEMENT OF THE CASE

Chalkey asked Roush to purchase the property in question for $76,000.00 after Judge Swope refused to stay the sheriff's sale. Roush purchased one parcel tract for $76,000.00 plus interest Chalkey owed in excess of $7,000.00 on the judgment, back taxes and paid all closing cost.

Chalkey lived rent-free in a house located on the parcel tract of land purchased by Roush for over eighteen months until a fire destroyed the house.

Roush never intended to sell this parcel tract of land until notified by Attorney Horner that Chalkey intended to sell her remaining two parcel tracts of land and it is based upon the sale of Roush's parcel tract of land.

Thereafter, Roush agreed to sell his parcel tract of land with Chalkey selling her remainder two parcel tracts. It was not until after the Complaint in Equity was filed and Judge Creany declared Chalkey needed a guardian ad litem and a new lawyer sua sponte, that Roush learned from Horner the existence of a prospective purchaser.

Unbeknown to Roush, Horner was Judge Creany's attorney of record representing Judge Creany as the Executor of the estate of Eugene Creany and as a moving party in a Complaint filed in November 2002. Judge Creany concealed his conflict of business interest with Horner from Roush and his lawyer, H. Reginal Belden, Jr. while issuing The Opinion and Decree Nisi filed of record on December 7, 2002.

To preserve issues for appeal in Pennsylvania Exceptions and Motion for Post Trial Relief were filed on December 24, 2002. by Roush. On February 14, 2003, Judge Creany disclosed his concealed business relationship with Horner.

The time to procedurally file and/or raise issues for appeal had elapsed long before Judge Creany disclosed his conflict of interest in this case. At no time prior to this Petition for Writ of Certiorari was it procedurally possible to raise Judge Creany's violation of Roush's constitutionally guaranteed Due Process Rights.

REPLY TO SUMMARY OF THE ARGUMENT

The Petitioner has not waived his right to a conflict free trial judge even though state appellate courts have not had an opportunity to review and address the trial judge's concealed conflict of interest that denied Petitioner Due Process due to the trial judge concealing his conflict of interest with Respondent's counsel until all applicable procedural time to raise and preserve issues for state court appeal had elapsed.

REPLY TO ARGUMENT

1. THIS COURT SHOULD EXERCISE ITS CERTIORARI JURISDICTION WHEN A TRIAL JUDGE CONCEALS UNTIL AFTER ISSUING A DECREE NISI OF FACTS AND CONCLUSIONS OF LAW, AND ALL APPLICABLE PROCEDURAL TIME HAS ELAPSED FOR RAISING AND PRESERVING ISSUES FOR APPEAL, THAT THE TRIAL JUDGE HAS HAD AND CONTINUES TO HAVE A CONFLICT OF INTEREST WITH RESPONDENT'S COUNSEL THAT HE SUA SPONTE APPOINTED AS GUARDIAN AD LITEM AND TO REPRESENT RESPONDENT AS AN ATTORNEY.

This Court's precedent in Wood v. Georgia, 450 U.S. 261, 271, 570, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1980), granted review of a conflict of interest that might have denied the employee due process even though this issue was *never* raised in a state court nor in the Petition For Writ of Certiorari. In Wood, this Court not only vacated the judgment below because the trial court had failed to investigate a possible conflict, but it also instructed the trial court to conduct a new revocation hearing if it found that an actual conflict existed and that the petitioners had *not* waived their right to a conflict free counsel.

By Judge Creany's own admission he concealed his conflict of interest with Chalkey's counsel from Roush and his lawyer, Respondent's Brief acknowledges that "The alleged conflict apparently took place...". In Schlesinger v. Councilman, 420 U. S. 738 at 733, 95 S. Ct. 1399, 43 L. Ed. 2d 591 (1975), this Court held that when "jurisdiction and equity issues..[are] sufficiently important

courts may consider issues on appeal that were not raised below."

A recusal Order was filed by Judge Creany on February 20, 2003. However, permanent recusal did not occur until April 7, 2003, by Order filed April 9, 2003, upon Motion by Roush filed March 31, 2003 after Judge Creany reconsidered his recusal as only a limited recusal and wanted to revisit this case. Letter from Judge Creany limiting his recusal by letter dated February 19, 2003. (App.1)

This admission of Judge Creany's conflict of interest was placed in a foot note and addressed in the Brief for Appellant before the Superior Court of Pennsylvania as the final decree was based entirely upon the Decree Nisi of a now recused conflict of interest trial judge's opinion, facts and conclusions of law.

In Lisenba v. California, 314 U.S. 219 at 236 (1941) this Court held it is well established that denial of Due Process in a state trial is the failure to observe that fundamental fairness essential to the very concepts of justice. The absence of that fairness totally infects the trial and prevents a fair trial.

Roush has not been given a fair trial under Due Process standards. It is not only on evidentiary and procedural grounds that the moving party needs to present testimony from a witness, but all the historical common sense of judicial proceedings require a witness. Due Process requires someone to testify against someone. In Roush, real property was taken without a word spoken from any witness at trial against Petitioner. This precedent is very

dangerous and opens the courts to hold an equity trial in Pennsylvania without the moving party producing a witness, and despite two motions to dismiss since no one testified a citizen's real property can be taken without just compensation. Due Process Rights guaranteed by The United States Constitution were abrogated in Roush.

The very validity of a Pennsylvania state equity trial is drawn in as a federal question on the grounds of it being repugnant to the Constitution and laws of The United States of America.

The rights Roush has as a citizen of The United States of America to Due Process are specifically set up under the Constitution and the authority to exercise enforcement upon all inferior courts is the duty of this Court. Ward v. Maryland, 79 U.S. 419, 430 (1870). Jurisdiction of this Court is based on Article III of The Constitution of the United States of America.

The Pennsylvania Superior Court's Order of June 4, 2004, should be vacated and this case dismissed because it has established an enforcement by law to abridge and/or deprive citizens of The United States property rights without due process of law. The holding in Roush as it presently stands is in direct conflict with the 5th and 14th Amendments to The Constitution of The United States of America. Specifically the 14th Amendment states:

> Section 1. All persons born or naturalized in The United States and subject to the jurisdiction thereof are citizens of The United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of The United

> States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

The holding in Roush is in direct conflict with appellate federal courts and other state courts of last resort decisions. No citizen of The United States of America should be deprived their legal ownership to real property in an equity trial when the moving party presents no evidence whatsoever in support of their case and it is later found that the trial judge sitting as the sole trier of fact concealed his conflict of interest in the case while issuing his findings of fact and conclusions of law that takes a citizen's real property.

Roush was unaware of Judge Creany's business relationship with Attorney Horner in October 1997. However, immediately following the injunction hearing and without any hearing on competence, Judge Creany sua sponte Ordered that Chalkey be declared a ward of the state, and appointed his lawyer, Mr. Horner guardian ad litem, and removed Chalkey's attorney, Rex McQuaide, replacing him with Attorney Horner as Chalkey's lawyer. This quid pro quo between Judge Creany and his attorney, Mr. Horner, generated legal fees for Mr. Horner and his law firm of Spense, Custer, Saylor, Wolfe & Rose, LLC while representing Judge Creany in unrelated matters.

In an additional response to the property in question being sold for in excess of 1.5 million dollars that was not on the trial record, Mr. Horner, representing a hospital, wanted to lease a building to be built on both Chalkey's two parcels and Roush's parcel. After the injunction hearing in October of 1997 Chalkey's decisions were made

by Attorney Horner and Chalkey agreed to sell her two parcels. By March of 1998 Roush agreed to sell his parcel.

After the agreement between Mr. Horner's hospital client and the purchaser of Chalkey's two parcels and Roush's parcel did not materialize, this property in question and Chalkey's former two parcels have been for sale since about November of 1998 until this present date of September 2005.

In Wood v. Georgia, 450 U.S. 261, at 280 this Court addressed the conflict of interest due process claim that *had been raised neither in the petition for certiorari nor before the state court.* Justice Souter suggested that the Wood remand order is part of "a coherent scheme," post, at 6, in which automatic reversal is required when the trial judge fails to inquire into a potential conflict that was apparent before the proceeding was "held or completed". Justice Stevens asserted that Wood only requires petitioner to show that a real conflict existed and a conviction must be reversed, post, at 9 (citing Wood footnote).

It is an undisputed fact that Judge Creany had concealed his actual conflict of interest when issuing a Decree Nisi. The very nature of a trial judge concealing his conflict of interest until after applicable procedural time to raise and preserve issues for appeal in Post Trail Motions is so serious a violation of fundamental due process that as in Wood when it is discovered, it must be heard and a mandatory reversal rule or vacate and remand rule applied.

In Wood at 272 and n. 20 Justice Souter's statement that "the signs that a conflict may have occurred were clear to the judge at the close of the probation revocation